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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-129

TAUB, HUMMEL & SCHNALL, INC.,
Petitioner-Appellant,

—against—

I. C. HERMAN & CO., INC.,
Respondent-Appellee.

RESPONDENT-APPELLEE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Questions Presented 1

Reasons For Not Granting Writ 2

CONCLUSION 5

TABLE OF CASES

Saunders Co. v. *Vincent*, 309 F.2d 65 (2d Cir. 1962) 4

STATUTES CITED

11 U.S.C. § 104a 2

31 U.S.C. § 193 ..... 2, 3, 4

Section 64(a)(4) of the Bankruptcy Act (11 U.S.C. § 104(a)(4) 4

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Questions Presented

1. Does the voluntary payment by a customs broker of United States customs duties owed by an importer subrogate the broker to the priority claim status, if any, that the United States Government might have had against the importer in the importer's subsequent Chapter XI proceeding had such payment not been made?

2. Can subrogated priority tax claim status in connection with customs duties paid prior to the institution of a Chapter XI proceeding be allowed in that proceeding if not "due and owing" at the time the Chapter XI petition is filed?

3. Can customs duties paid prior to the institution of a Chapter XI proceeding be properly classified as taxes "due and owing" on the date the Chapter XI petition is filed?

Reasons For Not Granting Writ

Congress did not see fit to include customs brokers who pay their clients' customs duties in the priority categories established by 31 U.S.C. § 193 and 11 U.S.C. § 104a. Therefore, regardless of their importance to the economy, and it is doubtful that their function is more important than unsecured trade creditors whose money is used to discharge tax and other forms of priority indebtedness, customs brokers are simply not entitled to, and should not be entitled to, subrogated priority status. If they were, then anyone who advanced money to an insolvent debtor to pay priority wage or tax claims would be entitled to such status, a result clearly not contemplated by the two statutes in question. The fact that customs brokers advance money to importers by paying the Government directly instead of advancing the money to the importer for transmission to the Government should not, and does not, change the result.

As far as Respondent-Appellee ("Herman") can determine, only one Court of Appeals decision has been rendered dealing with the inter-relationship between the two statutes in question. With all the bankruptcies that take place each year, and with customs duties allegedly aggregating over $4 billion annually, and with over three thousand customs brokers plying their trade, it is obvious that the issue of subrogated priority is raised infrequently at best. This infrequency also establishes the relative unimportance of the issues presented by Petitioner-Appellant ("Taub"). Moreover, it establishes that the parade of imaginary horribles allegedly resulting from the decision of the Court

below are nothing more than Alice in Wonderland fairy tales dredged up to convince this Court of the importance of what is in fact a very insignificant matter.

Disregarding the self-serving declarations made in Taub's petition, the fact that Taub has failed to make any showing that the decision in the Court below (a) will have a far-reaching effect on the Treasury Department or upon the entry of cargo into our country, or (b) will have any adverse effect on the public policy of the United States or the administration of its bankruptcy and customs laws, or (c) places an undue burden on the prompt collection of customs duties and the expeditious entry of goods. Moreover, on the question of violence to general equitable principles, it is respectfully suggested that violence to equitable principles would occur if the decision in the Court below were otherwise, *i.e.*, insolvent estates would be depleted to the detriment of unsecured creditors.

Without conceding that customs brokers are precluded from becoming sureties on customs bonds,[1] there is nothing to prevent such brokers from insisting that their clients execute surety company bonds as principals and then upon paying the customs duties, accepting an assignment of the surety company's rights. This procedure would give customs brokers the protection Taub is so worried about, since 31 U.S.C. § 193 specifically accords subrogated priority protection to the assignees of sureties. Or, alternatively, if customs brokers are really interested in protecting themselves, they can do what other creditors do—evaluate their client's credit standing carefully and/or refuse to extend credit and have their clients pay the customs duties themselves.

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[1] The regulations cited in Taub's petition relate to companies permitted to write customs bonds. Nothing cited in the petition indicates that a customs broker is precluded from becoming a co-surety on a customs bond. It is doubtful that the Government would complain about having an additional responsible party added to the bond.

While the Court of Appeals did not deal with the issue of whether subrogated priority status should be accorded to customs duties paid prior to the institution of a Chapter XI proceeding, there is a further reason why subrogated priority status is not available to customs brokers in the situation under discussion, *viz.*, the payment of import duties by a customs broker prior to the institution of a Chapter XI proceeding makes them duties that were *not* "due and owing" on the date the proceedings were instituted. Thus, since Section 64(a)(4) of the Bankruptcy Act (11 U.S.C. § 104(a)(4)) accords priority tax status only to taxes which are "due and owing" on the date the proceedings are instituted, the fact that the taxes are already paid takes them out of the priority category.

The decision in the Court below correctly relies on 31 U.S.C. § 193 and the rationale in *Saunders Co.* v. *Vincent*, 309 F.2d 65 (2d Cir. 1962), in which the Court held:

> "Congress has seen fit to grant subrogated priority in only a single specific instance, that of a surety making payment to the United States on a bond given to the United States.
>
> * * * * *
>
> The fact that Congress has chosen to single out a narrow class, that of sureties on bonds given to the United States, for special treatment gives rise to the strong implication that it meant to limit this priority solely to the class enumerated and withhold it from all other classes of creditors. The general equity power of federal courts is clearly superseded by and must be confined within the Bankruptcy Act and related statutes. Neither the Bankruptcy Act nor any statutes dealing with bankruptcy can be interpreted as creating the rights of subrogation and priority in a case such as this." (at p. 142)

CONCLUSION

For the foregoing reasons, the Petition for Certiorari filed by Taub, Hummel & Schnall, Inc. should be denied.

Respectfully submitted,

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